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Access to courts for non-state actors under the Africa Continental Free Trade Area

Submitted in partial fulfilment of the requirements of the Master of Laws (LLM) degree in International Trade and Investment Law in Africa

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DECLARATION

I, **u22910469**, do hereby declare the following:

1. This is my original work done by myself and has never been submitted for any degree or examination in any University or higher institution of learning for publication as whole or in part.
2. All the sources used have been indicated and acknowledged as complete references.
3. I did not allow anyone to copy my work with the aim of presenting it as their own

TONDERAI VAVARIRAI MUDENGE

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LIST OF INTERNATIONAL INSTRUMENTS

Treaties

African Union Agreement Establishing the African Continental Free Trade Area, 21 March 2018.

World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994.

World Trade Organisation Agreement on Technical Barriers to Trade, 15 April 1994.

World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994.

Treaty Establishing the Common Market for Eastern and Southern Africa, 5 November 1993.

Treaty Establishing the Economic Community of West African States Treaty, 28 May 1975.

Treaty Establishing the Southern African Development Community, 17 August 1992.

Treaty for the Establishment of the East African Community, 30 November 1999.

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01, 19 December 2007.

Treaty on the European Union, OJ C 325/5, 24 December 2002.

Treaty on the Functioning of the European Union OJ C326, 26 December 2012.

Organization of African Unity Treaty, 25 May 1963

Protocols

Supplementary Protocol to the Protocol on the ECOWAS Community Court of Justice, 19 January 2005

Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

Protocol to the Treaty Establishing the African Economic Community relating to free movement of persons, right of residence and the right of establishment, 29 January 2018.

Protocol on Tribunal in the SADC, 2000.

European Union, Protocol on the Statute of the Court of Justice of the European Union, 16 December 2004.

LIST OF ACRONYMS

AfCFTA	African Continental Free Trade Area
AfCFTA DSB	African Continental Free Trade Area Dispute Settlement Body
AMU	Arab Maghreb Union
AU	African Union
CEN-SAD	Community of Sahel–Saharan States
CJ	European Union Court of Justice
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
COMESA court	COMESA Court of Justice
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Trade and Tariffs
GC	European Union General Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IGAD	Intergovernmental Authority on Development
NAFTA	North American Free Trade Agreement
OAU	Organisation for African Unity
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RECs	Regional Economic Communities
RTAs	Regional Trade Agreements
SA CC	South African Constitutional Court
SADC	Southern African Development Community
WTO	World Trade Organization
WTO DSB	World Trade Organization Dispute Settlement Body

ABSTRACT

The African Continental Free Trade Area (AfCFTA) represents an unprecedent milestone in the pursuit of economic integration on the African continent. However, noble in its course, and ambitious in its extent, the agreement is fraught with the question of access to courts for non-state actors under the auspices of the agreement. This research aims to critically examine the nature of access to courts as provided under the AfCFTA, evaluating whether it should be considered a fundamental right or unnecessary privilege. Through a comprehensive analysis of legal frameworks, the Court of Justice of the European Union, Regional Economic Communities, international law and relevant case law, the research unshrouds the complexities attributable to the issue. The research will explore the potential impact of access to trade disputes, the role of non-state actors in African trade and the broader implications for the advancement of economic integration in Africa. By addressing this question, the dissertation aims to contribute to scholastic literature surrounding the AfCFTA's legal framework and its implications for fostering a more equitable and accessible trading environment for all persons.

Table of Contents

CHAPTER 1

The history of the African Continental Free Trade Area

1.1 INTRODUCTION

"This Organization we shall have set up would be quickly threatened by disintegration if it did not at the same time provide the machinery for settling the differences which would arise amongst its members."

- H.E Ahmadou Ahijo, President of Cameroon. -

The above words were uttered by President Ahijo before a thirty-two-member state delegation in Adis Ababa[1] who congregated with the intention to unite Africa. It was in Adis Ababa the thirty-two-state delegation saw the formation of the Organization of African Unity[2] (OAU) with, amongst its primary goals, the goal of harmonizing domestic economic policies.[3] This was subsequently reemphasised at the Lagos Plan of Action for Economic Development of Africa[4] and the reform of the OAU to the African Union[5] (AU) as it exists today. The same efforts of economic integration that were heard in Adis Ababa in 1963 have become the foundation of the African Continental Free Trade Area (AfCFTA). As is contained in the statement of President A. Ahijo above there was need for a dispute settlement mechanism that had an African identity to address the African disputes if ever integration was to succeed.

The OAU saw the establishment of the Commission of Mediation Conciliation and Arbitration[6] (CMCA) which had the mandate to resolve state disputes.[7] Subsequent to the above in 1991 on the 3rd of June, the Treaty Establishing the African Economic Community[8] (AEC) was adopted pursuant to the Lagos Plan of Action. The overall goal being to reaffirm the commitment to

[1] https://au.int/en/speeches/19630508/speeches-and-statements-made-first-organisation-african-unity-oau-summit-1963 (accessed 22 June 2023)
[2] Organization of African Unity Treaty
[3] Article II (2) of the Organization of African Unity Treaty
[4] Lagos Plan of Action for Economic Development of Africa
[5] Constitutive Act of the African Union
[6] Article XIX of the OAU
[7] OAU n (6) above
[8] Treaty Establishing the African Economic Community (AEC)

establishing an African Economic Community.[9] The AEC proposed a court, the Court of Justice[10] but this court was never established.[11], The court was supposed to have a limited jurisdiction where it only focused on disputes related to interpretation of the treaty of the AEC.[14] Legal standing was limited to state actors only. The African Union (AU) which replaced the OAU introduced the Court of Justice (COJ) which was also never established.[15] The COJ's jurisdiction was also limited to AU related matters and only allowed audience to state parties.[16] The AfCFTA like its predecessors established the Dispute Settlement Mechanism,[17] which follows the World Trade Organization Dispute model,[18] where legal standing is also limited to state parties.

Although the AfCFTA is negotiated by state parties, its effect is one that is largely felt by non-state entities like private companies and citizens. The AfCFTA offers for a Dispute Settlement Body (DSB) which was established under the auspices of the AfCFTA Protocol on the Rules and Procedures.[19] The DSB only allows audience to state party disputes and does not extend the same courtesy to non-state actors. It seems a miscarriage of justice to not include direct access to courts for non-state parties if they constitute the largest the largest constituency under the AfCFTA. Inclusion of the non-state actors is of great importance for the AfCFTA to achieve its intended outcome of a united Africa through trade. Litigation through state parties has in the past proven a daunting task because states often let politics lead and this has seen a lot of cases not litigated.

This research will focus on the legality of private parties to having locus standi under International Law when they are not considered subjects under the same International Law. The study will further look at mechanisms that include non-state access to courts, in particular the Court of Justice for the European Union (CJEU) which is an exemplar model for a number of DSMs in Africa.

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[9] Treaty Establishing the African Economic Community (AEC), Preamble
[10] Article 18 the AEC
[11] GJ Naldi, KD Magliveras, 'The African Economic Community: Emancipation for African States or Yet Another Glorious Failure' (1999) 24 North Carolina Journal of International Law

[14] Article 87 of the AEC
[15] GJ Naldi (n 11 above)
[16] Article 19 of the African Union Protocol of the Court of Justice
[17] Article XX of the The Agreement Establishing the African Continental Free Trade Area (AfCFTA)
[18] AEC (n 9 above)
[19] https://au-afcfta.org/trade-areas/dispute-settlement-mechanism/

1.2 RESEARCH PROBLEM

For the avoidance of doubt, the word non-state actors is going to be used interchangeably with private parties. The terms will refer natural persons and juristic persons whose contributions to international trade goes without say. Obonje [20] is one of the scholars that purport in juxtaposition non-state actors are in greater need for access to courts than state actors. Regardless of such scholarly contributions to the literature that concerns itself with this issue, the reality shows that non-state actors have been excluded from not only access to relief but to decision making that directly affects them as the largest constituency of international trade.

Regional bodies that assist in trade oversight seemingly disregard this issue and arrogantly so. In a system where different actors interact; friction is a likely consequence and dispute resolution acts as a bandage that mends relations. Granted that states are the ones that conclude treaties and must be bound by these treaties, it is also true that non-state actors acquire rights and duties from these treaties and it only fair to extend them courtesy to access courts without using states as vehicle.

The AfCFTA reaffirms its commitment to existing rights and obligations under other agreements which states are a party. If this commitment is to be satisfied, some RECs allow the right to access to courts for trade disputes. The agreement aims to achieve economic integration and boost intra-African. Trading under the AfCFTA began in January 2021 and although two years later, the agreement has not achieved its full potential the move to start was commendable. The AfCFTA limits access to courts under Article 20[21] to state actors which resonates with the limitation of the World Trade Organisation Dispute Settlement Mechanism. (WTO DSM)[22]

[20] J Obonje 'Neutering the SADC Tribunal by blocking individuals' access to the Tribunal' (2013) 2 International Human Rights Law Review 315; H Onaria 'Locus standi of individuals and non-state actors before regional economic integration judicial bodies in Africa' (2010) 12 (2) African Journal of International and Comparative Law 153.
[21] AfCFTA (n 6 above)
[22] GI Zekos 'The Case for Giving to Private Parties access to the WTO Dispute Settlement System' (2007) 8 3 Journal of World Investment and Trade 449

Relying on states for access to courts leaves room for political influence, diplomatic settlements, lengthy litigation, and litigation fatigue to mention but a few.[23] These can work against the goal of the treaty to 'boost trade' as non-state may fear the uncertainty surrounding conflict resolution as the main drivers of trade themselves.[24] The AfCFTA can borrow a leaf from the books RECs which have varying levels of access granted to private parties. This research will examine the varying degrees of access with the aim to address the topic, 'Access to courts for non-state actors under the AfCFTA: a right or unnecessary privilege?'. The study will endeavour first the theoretical legal framework that is surrounding the question of *locus standi* in international tribunals the examine how this applies in practice.

The disputes of non-state actors have two dimensions which is horizontal and vertical,[25] where non-state actors either litigate against states or litigate against other non-state actors. On the vertical axis private actors have a plethora of remedies at their disposal catered for under domestic courts, but access to the AfCFTA should still be an option open for their consideration. It is however more important to allow access to courts for non-state actors against states who are supposed to be the guardians of the treaty, where if states falter, even non-state actors can challenge them. It is disputes at these levels, both horizontal and vertical axis that the research makes a case.

The study as guided by the research topic will in turn try to address the question, 'Access to courts under the AfCFTA: a right or unnecessary privilege?'. An examination of the theory will immediately ensue after this Chapter to establish how locus standi can be established by law. Subsequently Chapter 3 and 4 looks at how this actually works in practice and Chapter 5 suggests how best to address the research question.

1.3 RESEARCH QUESTIONS

The research aims to address the following questions:

[23] Obonje, (n 20 above)
[24] K Ighobor 'AfCFTA: Implementing Africa's free trade pact the best stimulus for post-COVID-19 economies' (2020) *Africa Renewal*
[25] DM Engel 'Vertical and Horizontal Perspective on Rights Consciousness' 2012 Maurer School of Law: Indiana University

1. How to establish locus standi in the legal theoretical sense for actors in the international arena.
2. What lessons can the AfCFTA borrow from the CJEU for its consideration of the AfCFTA DSM amendments?
3. Can the AfCFTA DSM consider building from one of the African RECs?
4. How can the information from the investigation help the AfCFTA DSM?

1.4 THESIS STATEMENT

The question of whether access to courts for non-state actors under the AfCFTA is a right or unnecessary privilege is of utmost importance for the agreement to achieve full effectiveness. The question depending on how responds hold potential to show how a fundamental right is crucial for the success of the AfCFTA or its inimical and can become an unnecessary privilege that hinders the AfCFTA overarching goals.

1.5 JUSTIFICATION

The research topic aims to give life to the dreams and aspirations of the forefathers of the African unity from 1963. It has the potential to gainfully contribute to the literature on access to justice for non-state actors within the context of AfCFTA. The suggestions that are also contained herein may be a foundation on whence policymakers find valuable insights that help attain the goals of the AfCFTA. By allowing access to courts for non-state actors that form majority of the traders under the agreement, the research is positively contributing to the full realisation of non-state actors' rights and the benefits that flow from economic integration.

1.6 LITERATURE REVIEW

The literature around access to courts for non-state actors is very limited and thus most of the literature reviewed hereunder is mostly literature that critiques the AfCFTA dispute resolution mechanism in its entirety which also touches base on none state actors. One of the weaknesses that have been noted by the scholar, Gathii is that "the availability of additional mechanisms for dispute settlement in the AfCFTA, is an acknowledgment that judicial settlement of disputes

is unlikely to be the exclusive mechanism for resolution of most trade disputes.".[26] This provision of the AfCFTA[27] according to Gathii, makes the AfCFTA-DSM an option in contrast to the WTO-DSM which has Article 23(1) of the WTO's DSU.[28] This is a cause of concern for the scholar, as the advantages associated with the WTO-DSU might not necessarily flow to the AfCFTA-DSM which has copied the WTO-DSU.

The authorship of this research has a contrary view, that this actually allows a AfCFTA to test what model best works for it between the WTO-DSU model and the Court of Justice for the European Union model that has been copied by the RECs.[29] Although non-exclusivity of the AfCFTA-DSM allows for a trial, it also opens up for the problems associated with forum shopping.[30] Forum shopping however will expose the preferred model for traders and that affords a free survey for the drafters of the AfCFTA on how best to amend the AfCFTA. The weakness as suggested by the Gathii indeed have concerning loopholes but if this is examined from another vantage point this opening in one such the AfCFTA can explore for its advantage.

Another scholar of note is Akinkugbe who advocates for the amendment of the AfCFTA to include the private actors because they constitute the largest constituency of traders under the AfCFTA and that using the state as a vehicle causes bureaucratic delays. To achieve the

[26] JT Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement", (2019) *AfronomicsLaw* Blog.
[27] Article 3 of the AfCFTA
[28] Dispute Settlement Understanding of the World Trade Organization, Article 23(1) 1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding
[29] Gathii (n20 above)
[30] J Pauwelyn, "Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions", (2004) *Minn. J. Global Trade*

AfCFTA objectives as contained in Article 3[31] and Article 4[32] efficiency is of utmost importance.

Domestic legislation is also of great concern if one is to consider dispute resolution mechanism because many states gravitate towards exhaustion of local remedies before going elsewhere.[33] There has been a shift in attitude by African states wherein they have now acted to protect themselves from arbitrations in foreign jurisdiction. Tanzania,[34] Namibia,[35] South Africa[36] have put in place legislation that places emphasis on exhaustion for investment related disputes with Investment Acts. If the same laws are put for trade related disputes there may be conflict that then arises and because the authority is embedded in state sovereignty, states cannot be stopped from legislating when they do it for a public purpose and this may result in conflict with the AfCFTA at a later stage. The question of what law is considered superior will depend on the jurisdiction and how the AfCFTA is viewed by the independent states. In South Africa

[31] The general objectives of the AfCFTA are to:
(a) create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063;
(b) create a liberalised market for goods and services through successive rounds of negotiations;
(c) contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs;
(d) lay the foundation for the establishment of a Continental Customs Union at a later stage;
(e) promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties;
(f) enhance the competitiveness of the economies of State Parties within the continent and the global market;
(g) promote industrial development through diversification and regional value chain development, agricultural development and food security; and
(h)resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

[32] For purposes of fulfilling and realising the objectives set out in Article 3, State Parties shall:
(a) progressively eliminate tariffs and non-tariff barriers to trade in goods;
(b) progressively liberalise trade in services;
(c) cooperate on investment, intellectual property rights and competition policy;
(d) cooperate on all trade-related areas;
(e) cooperate on customs matters and the implementation of trade facilitation measures;
(f) establish a mechanism for the settlement of disputes concerning their rights and obligations; and
(g) establish and maintain an institutional framework for the implementation and administration of the AfCFTA.

[33] James Thuo Gathii, "Understanding Tanzania's Termination of its BIT with the Netherlands in Context", Afronomicslaw blog, 2019. Online: http://www.afronomicslaw.org/2019/04/01/understanding-tanzaniastermination-of-its-bit-with-the-netherlands-in-context/ (accessed 23 June 2023)

[34] Olabisi Akinkube, "What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution" Afronomics blog, 2019. Online: https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/ (accessed 23 June 2023)

[35] Namibia Investment Promotion Act

[36] The Protection of Investment Act 22 of 2015

for example, the AfCFTA would be International Law after it has been ratified.[37] Ratification of the international law only gives the said law the same status of domestic law.[38]

The domestic legislation enacted to avoid interstate/international arbitrations is reflective of the general sentiment of African states towards tribunals like the AfCFTA-DSM. The evidence on the African continent generally shows that states and business gravitate towards non-judicial remedies.[39] This is however largely attributable to the exclusion of private actors as RECs that give locus standi have not been as dormant as those that do not.[40]

1.7 RESEARCH METHODOLOGY

The following research is predominantly desktop research that will use the comparative analysis to establish a model befitting for the proposed tribunal. The study will examine academic literature, newspaper articles, treaties, case law and legislative provisions. Great reliance will be put primary and secondary sources of law and history which includes but is not limited to internet sources, academic books, tribunal case law, domestic legislation, and international law.

1.8 OVERVIEW OF CHAPTERS

The research will be divided into five Chapters that will address the following things. The First Chapter will introduce the topic by giving a brief history of where the philosophy behind the AfCFTA originated. It establishes why the predecessors of the AfCFTA had limited success and one such challenge being the research topic. It also provides the outline for how the research will unfold in subsequent chapters, a problem statement, and the research methodology.

[37] The Constitution of the Republic of South Africa 1996, Section 232 (4)
[38] Glenister v President of the Republic of South Africa [2011] ZACC 6 para [102].
[39] M Tsighe, "Can the Dispute Settlement Mechanism be a Crown Jewel of the African Continental Free Trade Area?, Afronomicslaw blog, April 8, 2019; Online: http://www.afronomicslaw.org/2019/04/08/can-thedispute-settlement-mechanism-be-a-crown-jewel-of-the-african-continental-free-trade-area/ (accessed 23 June 2023)
[40]

The Second Chapter will examine how *locus standi* is established by looking at the theoretical aspects of International Law. The requirements of legal personality and jurisdiction which are at the core of establishing jurisdiction will be discussed in this chapter. The chapter will conclude by considering whether the effort to have access to courts for non-state actors is on that is necessary.

The Third Chapter moves from the confines of theory and seeks to establish how locus standi applies in practice. The investigation will investigate the history and philosophy of the CJEU which has been a common standard on which many African tribunals copy. The conclusion then addresses the question whether this model has anything that may be copied by the AfCFTA DSM.

The Fourth Chapter furthers the investigation of *locus standi* in practice where the investigation moves to African tribunals. The investigation at this stage aims to expose the current attitudes of the African countries towards access to courts being extended to none state actors and wraps up by a comment of what this means for the research topic.

The last chapter which is the Fifth will consolidate the findings from the investigations from Chapter 1 through to Chapter four and then address the topic question. The essay will then make recommendations based on this finding and give a value judgement.

CHAPTER TWO

Making a case for the establishment of locus standi for non-state actors

2.1 INTRODUCTION

"The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law ... and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States."

-Reparation for Injuries Suffered in the Service of the UN[41]

The statement above refers to the legal personality of the United Nations as an International Organization and can be said to leave room for non-state actors as referred to in this research.[42] A party that is said to possess international legal personality can be said to have international rights and obligations and the ability to sought relief in the instance of harm.[43] The question of legal personality in the instance of states is one answered without difficulty, but this becomes a bit more complex when it comes to non-state actors as their personality can be regarded a derivative.[44] The legal personality of non-state actors is derived from treaties that are entered by states and in the absence of state consent such personality is limited or non-existent.[45] Legal personality gives locus standi and locus standi allows access to courts, and this discussion will be furthered below.

Non-state actors are without doubt the largest constituency under the AfCFTA as beneficiaries and as traders themselves. Any argument that disputes the importance of non-state actors is an argument that rolls but gathers no logical moss. Coupled with the rise of globalisation, where private parties are the most significant drivers,[46] it is prima facie a miscarriage of justice that

[41] 1949 I.C.J.Rep.174.
[42] M Olivier 'Exploring Approaches to Accommodating Non-State Actors within Traditional International Law' Human Rights & International Legal Discourse 4 (2010)
[43] RM Wallace & A Holliday, International Law in a Nutshell. Sweet & Maxwell, 2006
[44] Oliver (n 42 above)
[45] Oliver (n 44 above)
[46] E Hernandez Lopez 'Recent Trends and Perspectives for Non-State Actor Participation in World Trade Organization Disputes' Journal of World Trade, 4

the state determines the rules of trade and, without good reasons, denies other parties access to direct access to relief. Guided by the research topic, 'Access to courts for non-state actors under the AfCFTA: a right or unnecessary privilege?' the author will address several questions associated with this issue.

To make a case for the establishment of locus standi this chapter will labour on establishing what locus standi is and what are the prerequisites for it to exist. This will involve an examination of locus standi itself as concept and how this can be established for non-state actors under the AfCFTA to allow for direct access to court.

2.2 WHAT IS LOCUS STANDI ?

When approaching a court of law, it is incumbent on the applicant to please the court by satisfying that there was a duty on the part of the respondent to act or not act. The definition put differently, *locus standi* is 'the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted.'[49] This definition if read with due regard to the above discussion on legal personality shows that the two are interconnected and a party requires legal personality to have *locus standi*. The definition already helps understand how this is related to access to courts but leaves the question of whether this may be considered a right or unnecessary privilege. To address the research topic in full, the question of what is locus standi is going to be addressed by looking at where locus standi was originally extended to non-state actors.

According to several scholars, the Treaty of Amity, Commerce, and Navigation, Great Britain – United States (Jay Treaty)[50] was the foundation of modern arbitration,[51]which permitted non-state actors to file claims against states.[52] This treaty was the gateway to international arbitration for non-state actors and is of paramount importance. This treaty allowed access for

[49] https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Dispute/dispute-resolution-27-february-back-to-basics-locus-standi-in-litigation.html (accessed 27 September 2023)
[50] On November 19, 1794, representatives of the United States and Great Britain signed Jay's Treaty, which sought to settle outstanding issues between the two countries that had been left unresolved since American independence. The treaty proved unpopular with the American public but did accomplish the goal of maintaining peace between the two nations and preserving U.S. neutrality.
[51] H Brower 'Arbitration'. (2007) *Max Planck Encyclopedia of International Law* 13.
[52] Brower (n 40 above) 13

private parties to seek remedial action against states, and horizontal application of the law was introduced. The same treaty also acknowledged the vertical application of the law,[53] however, this was more reliant on the common law than international law itself.[54] A sharp rise in litigation was recorded when access to courts was extended to individuals.[55] If access to courts for non-state actors is allowed under the AfCFTA this may also be a likely consequence as widening access means allowing more applications for relief.

Non-state actors are lobbyist who provide political pressure on states when they draft and negotiate treaties. They are also available to give expert advice on legal frameworks that regulate these treaties as captains of trade and academics. Non-state actors also contribute in the international law arena through interpretation of treaties as accommodated by the WTO Dispute Settlement Panels and the International Law of the Sea Tribunal.[56] All the obligations ascribed to non-state actors in this instance definitely makes the non-state actors an important actor but this does not translate to inherent legal personality. The duties referred to above still are derived from states through treaties and without such authority non-state actors have no such personality.

With the above history of where locus standi was extended to non-state parties, it is important to note that this was a derivative of states through a treaty. If the AfCFTA is to consider extending legal standing to none state actors, such would have to be done through the treaty which gives personality to non-state actors. On the face of it, allowing access to relief to promotes fairness and yields positive results[59]that advance trade in general,[60] if this is the case it is worthwhile to investigate how locus standi can be extended to non-state actors. The limitations of the WTO are known even in consultations regarding trade policies.[61] This

[53] Article VI of the Jay Treaty, 1794
[54] EI Renick & JB Moore 'History and Digest of the International Arbitrations to which the United States *has been a Party*, together with Appendices containing the Treaties, relating to such Arbitrations, and Historical and Legal Notes on other International Arbitrations ancient and modern, and on the Domestic Commissions of the United States for the Adjustment of International Claims' (1889)*The American Historical Review* 4 p563–568
[55] RR Cortado 'Central American Court of Justice (1907-18)' (2013) *Max Planck Encyclopedias of International Law*
[56] DB Hollis, (2005).Why State Consent Still Matters - Non-state Actors, Treaties and the Changing Sources of International Law, 23:137 Berkley Journal of International Law 138
[59] International Trade Centre (n 45 above) 4
[60] A Hudson 'The role of the private sector in advancing trade facilitation and modernisation' (2018) *Wolters Kluwer*.
[61] G Messenger 'The public-private distinction at the World Trade Organization: Fundamental challenges to determining the meaning of "public body"' (2017) 15 1 *International Journal of Constitutional Law* 61

omission, a weakness of sorts, may have passed to the AfCFTA DSM, which borrows the blueprint from the WTO DSM. Now that the AfCFTA DSM is operational[62] to introduce the requisite legal personality to establish *locus standi,* the first consideration would be through amendment of the Protocol. The possibility of such an amendment will now be discussed in turn.

2.2.1 AMENDING THE AFCFTA PROTOCOL

The Jay Treaty provides the first option that can be considered for the AfCFTA, which would be an amendment since the AfCFTA is already operational. According to Article 31 of the AfCFTA Protocol, it is Article 29 [63] of the AfCFTA that sets the conditions for amending the Protocol, and the amendment will enter into force according to Article 23[64] of the AfCFTA. It is important to note that Article 25 of the AfCFTA [65] disallows reservations under the Agreement, which means that when consenting to the treaty, a party consents.[66]

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[62] https://au-afcfta.org/trade-areas/dispute-settlement-mechanism/ (accessed 27 September 2023)

[63] Any State Party may submit proposal(s) for amendment to this Agreement to the Depositary.
2. The Depositary shall within thirty (30) days of receipt of the proposal, circulate the proposal to State Parties and the Secretariat.
3. A State Party that wishes to comment on the proposal may do so within sixty (60) days from the date of circulation and submit the comments to the Depositary and the Secretariat.
4. The Secretariat shall circulate the proposal and comments received to members of the appropriate AfCFTA committees and sub-committees for consideration.
5. The relevant committees and sub-committees shall present, through the Secretariat, recommendations to the Council of Ministers, for consideration, following which a recommendation may be made to the Assembly through the Executive Council.
6. Amendments to the Agreement shall be adopted by the Assembly.
7. The amendments to this Agreement shall enter into force in accordance with Article 23 of this Agreement

[64] This Agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes shall enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification.
2. The Protocols on Investment, Intellectual Property Rights, Competition Policy and any other Instrument within the scope of this Agreement deemed necessary, shall enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification.
3. For any Member State acceding to this Agreement, the Protocols on Trade in Goods, Trade in Services, and the Protocol on Rules and Procedures on the Settlement of Disputes shall enter into force in respect of that State Party on the date of the deposit of its instrument of accession.
4. For Member States acceding to the Protocols on Investment, Intellectual Property Rights, Competition Policy, and any other Instrument within the scope of this Agreement deemed necessary, shall enter into force on the date of the deposit of its instrument of accession.
5. The Depositary shall inform all Member States of the entry into force of this Agreement and its Annexes.

[65] No reservations shall be made to this Agreement

[66] GF Jacob 'Without Reservation'(2004) *Chicago Journal of International Law* 19.

The need to extend *locus standi* is important. However, to remove this from the bubble of idealism, one must consider the bureaucracy that bedevils amendments. Without much engagement of the text regarding what is required before an amendment is accepted, one may examine how the AfCFTA is an agreement and how states have received it. Slow is the befitting descriptor of the adoption and ratification process of the AfCFTA itself. At the time of writing only 47 of 55 ratifications[67] have been confirmed. The reason for hesitation varies from country to country as to why not all countries have ratified the treaty and such hesitation may not overlooked when one considers hinderances to an amendment. Protectionism has seen some countries delay ratification of the AfCFTA, and this has been evident with some of the big economies like South Africa and Nigeria.[68]

Political instability is an antithesis to the functioning of the AfCFTA DSM as it aims to be a rules-based system that respects of law.[69] The West and Central African recent spate of coups raise concern and Ogunranti[70] notes that if the AfCFTA is to work, it "will depend on the extent to which political stability and the rule of law are entrenched in African countries." The African Union recently suspended Niger from all activities that fall from the Organisation[71] and this is also true for all 6 other countries under military regimes where democracy has been truncated.[72]

Without even engaging the AfCFTA Protocol itself to examine the bureaucracy involved in amending the Protocol, a quagmire has already been established. It would have been foolhardy to ignore the antecedent atmosphere required when the provisos of the Protocol are applied. Lack of political will and military coups undermine any prospects that may flow from trying to amend the AfCFTA. Cognizant of the limitations on the continent, introducing legal personality by way of amendment has shown to be difficult but there exists another possibility through the Vienna Convention on the Law of Treaties.

[67] TRALAC 'Status of AfCFTA ratifications' https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html#:~:text=As%20at%20August%202023%2C%2047,ratification%20(ordered%20by%20date)%3A (accessed 20 August 2023)
[68] AfCFTA: Africa is moving too slowly towards a single market (n 53 above)
[69] A Ogunranti 'The Effect of Recent Coups in Africa on the African Continental Free Trade Agreement' (2023) *AfronomicsLAw*
[70] Ogunranti (n 62 above)
[71] 'African Union suspends Niger over coup, prepares sanctions' *Reuters* 22 August 2023
[72] Ogunranti (n 58 above)

2.2.2 VIENNA CONVENTION ON THE LAW OF TREATIES

Consent is one phenomenon that is at the heart of this second option, and such consent is required for the parties who will have burden\obligation imposed upon them. The question of consent flows the old age *pacta tertiis* rule.[73] In the absence of consent a state may pervade obligations in international law[74] and the same holds for non-state actors. According to Section 4 of Part III (Articles 34 to 38) of the Vienna Convention on the Law of Treaties (VCLT hereinafter) obligations and rights may be created for 'third states'[75]. What this means is that a treaty like the AfCFTA may create rights and obligations for non-party states. Literal reading of the Article means that such extension is limited to states[76] but scholars like Tzeng[77] argue that there is no reason why this cannot be extended to non-party non-state actors too.

It is from the reasoning of Tzeng the research proceeds and examines Article 35 of the VCLT. It provides that, "an obligation arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing. The definition thus only shows intention to other states not non-state parties.

However, Article 13 of the AfCFTA Protocol makes no reference to states but the issue of 'substantial interest'.[78] One can choose to interpret this broadly and argue that even in the absence of explicit expression of intention to include non-state actors, they do have substantial interest and should be allowed audience by that. This interpretation is however suffocated in its infancy as the AfCFTA, and the AfCFTA Protocol are explicit in their exclusion of non-state actors. However, for the sake of argument the broad interpretation of Article is allowed, the next condition to satisfy is that of consent by those on where legal personality is to be imposed: non-state actors.

[73] Vienna Convention on the Law of Treaties Art. 34
[74] Tzeng (n 38 above) p.402
[75] A state not party to the treaty
[76] Cassese A 'The status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts', *INT'L & COMP. L* Q p 423
[77] Tzeng (n 62 above)
[78] AfCFTA Protocol Art 13(2)

The requirement calls for consent in writing and the open question is, in this instance is, is this given individually or collectively? Individually being that non-state actors in writing provide such consent by themselves or collectively through groupings of companies, states etc. In the best-case scenario, which is the latter, the argument proceeds and says such written consent is possible at states level, this then satisfies the second requirement after a stretch of best case scenarios. Even if the second requirement is satisfied, one cannot ignore the reality that the AfCFTA has no intention of including non-state actors.

Impossible is not the word to describe the task but cumbersome is, and after conceding that this has been jumping from one very broad interpretation to the other, the research topic recurs, 'Access to courts for non-state actors under the AfCFTA: a right or an unnecessary privilege?'. At this juncture the question is left as rhetorical as the chapter proceeds to explore another way to establish obligation for the purpose of *locus standi*: customs.

2.2.3 CUSTOM

The source from whence this establishes legal personality is through *opinio juris*[79] which is defined as evidence of a general practice accepted as law.[80] "In the wording of Article 38 (1) (b) of the Statute[81]there is no reference to state practice made it is commonly accepted that the practice referred to herein is that of states.[82] However, as discussed above, non-state actors play a pivotal role in contributing to international law particularly through treaties and given custom are less formalised this method is comparatively more flexible. Contributions from non-state actors can thus be considered to form customary law.

It is however rather premature to establish that there is practice as that which can establish custom as being referred to above. More accurately, even with effluxion of time the same reality will stand as the AfCFTA in its current form creates no room for such practice to develop. This renders this option inappropriate for the current investigation and is discarded for the consideration of yet another avenue, which is, the general principles of law.

[79] an opinion of law or necessity
[80] Statute of the International Court of Justice art. 38 (1) (b).
[81] ICJ (note 51 above)
[82] *Nicaragua v. United States of America, Military and Paramilitary Activities* 1986

2.2.3 GENERAL PRINCIPLES OF LAW

The definition of what constitutes General Principles of Law is a bit difficult to obtain given the varying contributions from scholars. Pellet[83] however summarized it as 'unwritten legal norms of a wide-ranging character recognized in the municipal laws of states and transposable at the international level'. Non-state actors contribute immensely to the form and substance of domestic laws such contributions differ from state to state but contribution regardless. If non-state actors on a domestic level or REC level contribute to the jurisprudence that establishes legal personality of non-state actors, this may be transposed to the AfCFTA.

Article 19 (2) of the AfCFTA suggests that when inconsistency or conflict arise between the AfCFTA, 'regional bodies with levels of higher integration shall maintain that higher level'. Erasmus[85] notes that Article 19(2) recognizes RECs as legal persons and thus have legal personality. The Article however seems to allow reference to RECs when there is inconsistency or conflict with the AfCFTA and says nothing to the effect of gaps in the legal framework. The word gap is loosely used as there is no gap in legal framework of the AfCFTA relating to locus standi as it explicitly limits it. It may also be worth noting that this 'higher level of integration' refers to trade liberalization.

However, there is no reason why this can also not be for other aspects of trade so long as it promotes integration as is the goal of the AfCFTA. If this is to be the case, then COMESA's treaty and its guiding principles may be considered as it confers legal personality on non-state actors where access to courts is permissible. This method of establishing legal personality which allows for locus standi is one that does not involve consent of the original parties (signatory states to the AfCFTA). What this means in play is that the AfCFTA DSM then allows locus standi without considering what the AfCFTA Protocol itself says and this may result in disaster as the DSM then assumes unregulated powers.

It would be disingenuous to sweep under the carpet that this avenue has better prospects in comparison to other avenues already considered. Legal personality for non-state actors already

[83] A Pellet 'Article 38 in The Statute of the ICJ' (2012) *A Commentary* 667
[85] Erasmus G 'AfCFTA Parallelism and Acquis' (2021) *TRALAC*

exists under the COMESA can be transposed to the continental level and allow for access to courts for non-state actors.

However, arguments against its implementation still hold strong and by that the research proposes yet another avenue, unilateral acts.

2.2.4 UNILATERAL ACTS

'Although initially concerning a limited group of States, other declarations were addressed to the international community as a whole, containing *erga omnes* undertakings' [87] The statement above seeks to validate the assertion that one state can create an obligation on itself and it will apply to the international community. If legal personality was to be established under such a circumstance the effort would be too far fetched it is not worth consideration. This in essence would require non-state actors to self-attribute legal personality that allows them locus standi under the AfCFTA DSM.

It has already been noted that this venture would be too adventurous but if one was to prsue adventure they would have to consider who makes such declarations. Individuals or the collective? . Declarations can be made by anyone with the power to do so and they may do it in their capacity as representative of whatever group they have authority over, but they may not dictate that such obligation fall under a concluded treaty.

The chapter thus far has tried to navigate through the murky waters of probability, where it tried to establish a way to ascribe legal personality to non-state actors under the AfCFTA for the benefit of establishing locus standi. The reader can make a value judgement as to whether they have been satisfied that there exists a loophole for exploration. If such efforts have failed thus far, chance lays in the second leg of the inquiry which looks at the requirement of jurisdiction.

2.3 JURISDICTION OVER THE AFCFTA DSM OVER NON-STATE ACTORS

[87] *Australia v. France & New Zealand v. France*, I.C.J. 1974

Jurisdiction is the second of the two-phase test of locus standi after the obligation test. The AfCFTA DSM has jurisdiction over state parties and it is through states that the jurisdiction to address non-state actors is extended.[88] However, such power allows states to either proceed with the matter through diplomacy,[89] arbitration or no action at all.[90] Such limitation may pose a threat to the proper functioning of the AfCFTA DSM as political will and general litigation aversion by states may resultantly see matters not brought before the AfCFTA DSM. The question of what jurisdiction is, is however important to address before much engagement on the subject matter.

Jurisdiction in itself has four dimensions; ratione personae[91], ratione materiae[92], ratione temporis[93] and ratione loci[94]. The dimensions only have little difference save for jurisdiction ratione personae which may have some sophistication around non-state actors litigation. The complication around the fact that to establish this jurisdiction, consent is a sine qua non[95] from the parties involved. In vertical litigation this would mean that, the private entities consent to the jurisdiction of the AfCFTA DSM over them. States consent to such jurisdiction through signing of treaties, operation of law: estoppel, or unilateral act[96] and this part of the chapter seeks to establish if the same is true for non-state actors.

2.3.1 INTERNATIONALIZED AGREEMENTS

Regarding jurisdiction the one who wishes to litigate has the right to elect the proper court in which to proceed.[97] Jurisdiction may be established in a plethora of courts in one dispute but in litigation the plaintiff is *dominis litis* [98]in this regard.[99] This is true for litigation in general but not for the AfCFTA in particular. The choice of court is predetermined by the AfCFTA

[88] GM Ruotolo in 'Robert Howse, Hélène Ruiz-Fabri, Geir Ulfstein, Michelle Q. Zang, (eds.) The Legitimacy of International Trade Courts and Tribunals' in Bungenberg M, Krajewski M, Tams CJ, Terhechte JP and Ziegler AR (eds) (2020) *European Yearbook of International Economic Law* 453.
[89] Akinkgube (n10 above)
[90] Akingube (n 10 above)
[91] By reason of the person
[92] the features and characteristics of the subject-matter of a dispute
[93] By reason of time
[94] By reason of the place
[95] State of Eastern Carelia, Advisory Opinion, 1923 Permanent Court of International Justice
[96] Corfu Channel (UK v Albania), Judgement 1948 ICJ
[97] Visser NO and Others v Van Niekerk and Others (5937/16) [2018] ZAFSHC 200
[98] master of the suit
[99] Visser (n76 above) parra 9

which is the internationalized agreement, and it already determines how jurisdiction is established. Article 3 of the AfCFTA Protocol dictates that only state party disputes are to be heard by the DSM and even in the instance where other bodies have concurrent jurisdiction, the AfCFTA DSM is the only choice. This limits the choice of courts for plaintiffs and by extension that of non-state actors who are subservient to the states.

The Article makes it cast in stone that jurisdiction is limited to states and even though, estoppel and unilateral acts exist not much can be gathered from the options. The other two options will be discussed herein to make it elaborate how jurisdiction is limited.

2.3.3 ESTOPPEL

The doctrine of estoppel comes to the fore when a party, including a state, creates an impression of a particular situation and the other party, relies on such misrepresentation *bona fide*, and acts or abstains from an action to its detriment.[100] The test to satisfy this doctrine is as follows:
'(i) the statement of fact must be clear and unambiguous;
(ii) the statement of fact must be made voluntarily, unconditionally, and must be authorized;
(iii) there must be reliance in good faith upon the statement, either to the detriment of the party relying on the statement or to the advantage of the party making the statement.[101]

The characterisation of the doctrine as a general principle means that it is applicable in proceedings before courts, standing tribunals and ad hoc arbitrations.[102] In practice this would mean that is a state that is party to the AfCFTA by conduct induces another party (state or otherwise) the belief that it accepts the jurisdiction or will not contest it should a dispute ensue between the parties, should a dispute coming within the title of jurisdiction later be brought before the Court, the Court will, subject to proper examination of all the circumstances, not

[100] Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar) (Judgment) [2012] ITLOS Rep 4, 42 (para 124).
[101] DW Bowett 'Estoppel before International Tribunals and its Relation to Acquiescence' (1957) *British Year Book of International Law* 176
[102] Wass J 'Jurisdiction by estoppel and acquiescence in international courts and tribunals' (2017) *The British Yearbook of International Law*

decline jurisdiction.[103] This means that unlike other forms of establishing jurisdiction, estoppel is not consent reliant.[104]

An example of how this might play out would be a state A enters into a trade agreement with state B but state B engages a non-state actor through a public-private partnership. In this agreement state A and state B are the ones who actually enter into the trade Agreement but company A is also involved in this agreement. If the contract recognizes the AfCFTA DSM as the arbitration body of choice with jurisdiction to deal with disputes that flow from such a contract, can company A approach the court via estoppel? The short answer is no. As earlier alluded to in the previous chapter, the legal personality of company A is derived from the partnership agreement that exists between itself and state B. Such personality is limited to the partnership agreement and does not flow from the AfCFTA Protocol. For Company A to approach the AfCFTA DSM it needs personality from the protocol which cannot be established via estoppel.

This fails to satisfy the first part of the enquiry but for interest's sake the other legs of the enquiry to establish estoppel will be examined. To satisfy the second requirement the government must have authorized whoever makes such a contract, and this is achievable through signatures endorsed by whomever is authorised to act on behalf of the government in this instance it may be by the Minister of foreign affairs and the Minister of trade. This would satisfy the second requirement. Now for the last part where the reliance of the other party is in good faith may be where the efforts to squeeze in non-state actors fail. This is so because, the tribunal in the contract objectively excludes non-state actors from its jurisdiction.

The above effort is however not a figment of the imagination of the author as such efforts have been explored in investment tribunals like ICSID.[105] The doctrine of estoppel is a well-established doctrine that is respected in International Law. The explicit and objective standard by the AfCFTA Protocol in Article 3 is the spanner in the works. In the *Government of the province of east kalimantan v. Pt kaltim prima coal rio tinto (icsid case no. Arb/07/3)* the

[103] Rosenne, The Law and Practice of the International Court, 567; see also WM Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards (1971) *Yale University Press* 394,

[104] Rosenne, (n 92 above)
and Practice of the International Court,

[105] *East Kalimantan v PT Kaltim Prima Coal* ICSID Case No ARB/07/3 (28 December 2009), paras 211–6

tribunal held that when such an article exists it cannot be ignored or waived.[106] Estoppel like all other backdoor admission for non-state actors has failed to account for access to courts.

2.3.4 UNILATERAL ACT

For the sake of brevity, this will not be engaged again under jurisdiction as it has already been discussed under obligations and the same arguments hold. However, these two are different when one asks of their impact regarding locus standi under obligations and under jurisdiction.

2.4 CONCLUSION

To conclude this chapter, the main question is drawn again, "Access to courts for non-state actors under the AfCFTA, a right or an unnecessary privilege?". For locus standi to be established, it is important to address the question of legal personality.. This chapter has laboured to establish how to extend locus standi to non-state actors, but it has also shown how improbable that venture is. Capacity, political will and legal limitations make such extension seemingly one of privilege. In theory the establishment of locus standi has proven difficult, the follow up question would be, is it the same in practice? The next chapter will try to address this question.

[106] A David & R Williams 'Jurisdiction and Admissibility, in Muchlinski, Ortino, Schreuer (eds.) *The Oxford Handbook of International Investment Law*, pp. 871-872.

CHAPTER 3

How the CJEU was formed and what lessons can be drawn from the system to help with the AfCFTA DSM

3.1 INTRODUCTION

The European Union which may have its flaws as a Customs Union, boasts of a lot of successes that overshadow some of the limitations there is. It is from this yardstick that the AfCFTA may find inspiration and emulate the good and learn from the mistakes of the EU. Constitutedd of the General Court (GC) and the Court of Justice of the European Union (CJ) as adjudicators in trade disputes amongst other disputes, the EU decided to merge these efforts under the Court of Justice of the European Union (CJEU).[107] The General Court extends locus standi that is qualified and for a very limited number of disputes to non-state actors.[108] The CJ in certain instances acts as a court of appeal for matters that are referred from domestic courts and these courts are with the mandate to protect the EU laws.[109] The CJEU is a model common with African RECs and their dispute settlement mechanisms, however this is not the model that the

[107] R Manko 'Annulment of an EU Act' (2019) *European Parliamentary Research Service* PE 642.282 4 2.
[108] Treaty on the Functioning of the European Union. Article 256(1)
[109] E Biernat 'The locus standi of private applicants under Article 230(4) EV and the principle of judicial protection in the European Community' (2003) *Jean Monnet Working Paper* 12

AfCFTA DSM chose, and this chapter will try to establish why that was the case by looking at what the CJEU has to offer.

In the previous Chapter the research tried to establish whether extending *locus standi* to non-state actors is possible by examining the theories of law. In this Chapter, the research examines how a tribunal that allows *locus standi* to private parties works by looking at the CJEUs example and comparing it the WTO style chosen by the AfCFA. The conclusion to be drawn will revert to the research topic and try to address whether access to courts should be extended to non-state actors or it's an unnecessary privilege. To examine the question of *locus standi* the following paragraph will look at the provisions of the guiding law of the CJEU that allow for the access to courts for non-state actors.

3.2 Article 230(4) and 263(4) of the TFEU

Article 230(4) provides that:
"Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation".
From the above the following deduction is made, it gives three conditions under which locus standi was extended to the private persons. These are under review proceedings where: (a) a decision is addressed to the applicant, (b) a decision is addressed to third parties and applicants claims that it is of 'direct and individual concern' to him or her and (c)a decision is 'in the form of' a regulation and is of a 'direct and individual concern' to the applicant.[110]

The provision above was later replaced by Article 263(4) of the TFEU after the Treaty of Lisbon became effective in 2009. Article 263(4) reads:
"*any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct*

[110] J.H.H.Weiler 'The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community' *New York University School of Law*

and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

In subsequent paragraphs the essay labours at examining these two articles and establish what was the material change and why such change was introduced. Understanding the history and philosophy that led to such change is of great importance when considering what may work for the AfCFTA DSM.

3.3 Why did the law develop regarding the locus standi?

The TFEU was first published in the 1950s in parallel to the development of Europe under the European Coal and Steel Community (ECSC)in 1952.[111] Noble in its efforts though it was, there was general consensus amongst scholars that the original Article under the TFEU that granted *locus standi* to private persons was limited. [112] It was after futile efforts to push the CJEU to adopt a different interpretation of the TFEU and create new precedent that was the precursor to the changes borne after the Treaty of Lisbon[113]. The Courts argued that it was the sole duty of the state's party to the TFEU to amend the founding treaty to what it became and what it is.

After what may have looked like passing the buck by the court, the states under the TFEU ended up doing the needful and instituted the reform.[114] The initial lesson that can be considered by states under the AfCFTA is that, when change is required under the treaty, courts are reluctant to interpret the treaties in such a way as to broaden the limits of the treaty. If the AfCFTA is to consider extending access to non-state actors, the duty is incumbent on state actors not the AfCFTA DSM and its organs. The AfCFTA DSM is a creature of the AfCFTA Protocol that derives its powers from the Protocol and can only be modified by parties that are

[111] M Rasmussen p2
[112] A. Arnull, 'Editorial: April Shower for Jégo-Quéré', 29 European Law Review (2004) p. 287; C. Koch, 'Locus standi of private applicants under the EU Constitution: preserving gaps in the protection of individuals' right to an effective remedy', 30 European Law Review (2005) p. 511.
[113] Peers, S. and Costa, M. (2012). Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission. European Constitutional Law Review, 8(1), pp. 82-104.
[114] Case C-50/00 Union de Pequenos Agricultores v Council (UPA) [2002] ECR I-6677.

empowered by the said Protocol. The chapter now tries to examine why the CJEU moved from the Article 230(4) enquiry by looking at what the enquiry required to acquire *locus standi.*

3.4 Establish direct prejudice.

"Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in later on. "It is possible," says the gatekeeper, "but not now."

- Franz Kafka's "Before the Law"

The metaphor above explains what existed with access to the CJEU which was extremely limited by the treaty and restrictive court interpretation. To establish *locus standi* a non-state actor (non-privileged party) had to establish a direct causal link between a Community[115] measure and the legal position of the applicant.[116] In an effort to develop this principle the court held that direct concern is established when "a complete set of rules which are sufficient in themselves and require no implementing provisions."[117] What this meant in practice was simply that one could challenge a decision that directly affected them because of a provision of the Community, and this was not an onerous requirement and may be considered even for the AfCFTA DSM. However, the challenge came from the requirement to show test for individual concern.

3.5 Test for individual concern

The seminal case when one was addressing the requirement was the *Plaumann* case[118] which created judicial precedent that has been qualified the test for individual concern. The test requires an applicant to satisfy the following: "Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason

[115] Community refers to he European Union and its member states
[116] N Stratieva 'Locus Standi for Private Applicants under Article 230 EC- ...And Justice for All?' European Studies: BA Paper Maastricht University
[117] Case T-173/98 [1999] ECR II-3357.
[118] Plaumann & Co v Commission of the European Economic Community (25/62) [1963] E.C.R. 95

of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed."[119]

Biernat, is of the view that the test is 'very restrictive and difficult to meet' and it limited access for applicants to closed category which was,'fixed and ascertainable'.[120] In the case of *Toepfer* the court held that it could not grant audience to an applicant whose application for an import licence was rejected because of the technicality of the day the applicant sought relief.[121] In the *Calpak* case, the applicants according to the court failed to establish the question of individual concern as their application failed to establish how the regulation affected the exclusively.[122]

The CJEU was consistent in the strict application of the individual concern that it went to the extent of denying access to an NGO that was representing people in the *Stichting Greenpeace Council* case.[123] Such restrictive interpretation of the treaty goes against well-established litigation norms where one can apply for relief in personal capacity or on behalf of another provided, they have authority to do so.

The nature of trade in Africa is largely informal and establishing individual concern under such limited conditions may prove a difficult hurdle. This is so because, the requirement is formalistic in nature where 'groups' have characteristics peculiar to them by some standards. Such standards are hard to establish for informal traders who only share commerce in common and thus this test may not be applicable for the AfCFTA DSM. With the *Plaumann* test as a standard, access to court would be a fools paradise under the AfCFTA.

3.6 Calls for reform of Article 230(4) of the TFEU

[119] Plaumann (n109 above) p.107
[120] Biernat (n 105 above) 7.
[121] *Toepfer v Commission* Case 106-107/63 [1965] ECR 405
[122] *Calpak SpA and Societa Emiliana Lavorazione Fruita SpA v. Commission [1980] ECR 1949*
[123] *Stichting Greenpeace Council and Others v Commission*, T-585/93, 9

Calls for reform were first recorded within the CJEU itself through Advocate General Jacobs[124] where he suggested a different interpretation of individual concern. His suggestion was that, "the [Community] measure has, or is liable to have, a substantial adverse effect on his interest." The suggestion would relax or replace the very strict requirements of the Article 230(4). The other recorded incident towards the call for reform was witnessed in the case *Jégo-Quéré*[125] In this case the court followed the suggested interpretation by Jacobs AG and held, "…in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard."

The above was held in the Court of First Instance (CFI) but the innovative interpretation was jettisoned but the higher court and the default position established in the Plaumann was cemented. At this stage the court had refused to partake in what it called 'judicial activism'[126] and thus passed the proverbial ball back to the states to address the question of *locus standi*. The effort by the court was an exercise in futility, but the contributions of Jacobs AG are valuable when one is to consider *locus standi* for non-state actors under the AfCFTA. Political will of the states is at the core of such a requirement, and such will is currently not evident amongst African states in anything to do with trade litigation.[127]

The interpretation by Jacobs AG provides a possible condition that may be used for the AfCFTA DSM, when and if it decides to extend *locus standi* to non-state actors.

3.7 The new test for locus standi – Article 264 of the Lisbon Treaty

After the buck was passed to the state to address the issue of *locus standi* the states through a futile exercise tried to amend the Constitutional Treaty (CT) where Article III-270 tried to

[124] Stratieva (n 107 above)
[125] Commission of the European Communities v. Jégo-Quéré & Cie Sa. Case C-263/02 P
[126] Stratieva (n 107 above)
[127] M Mbengue (2014). African perspectives on inter state litigation. In N.Klein (Ed,) Litigating International Law Disputes: Weighing the Options (pp 166-190). Cambridge University Press

replace Article 230 EC.[128] It was however through the subsequent effort that the latest version of the provisions for act of annulment can be found under Art. 263 of the Lisbon Treaty came to be. The wording of this Article is mentioned verbatim above.

The new provision introduces what is seemingly a relaxation of distinction that is made between legislative and regulatory acts.[129] Change indeed the Article has introduced but the extent was not the desirable one to effect considerable change for the non-state actors.[130] The introduced change now requires that for regulatory acts that do not require implementing measures the private applicant would only have to establish direct concern. As was already discussed above, access to courts for non-state actors under the TFEU was largely limiting on the question of direct and individual concern. This was not addressed in the subsequent development and thus even with the amendment, *locus standi* remains limited under the CJEU.

It is these limitations that the AfCFTA DSM would have to be cognisant of when considering extending *locus standi*. The CJEU has been operational and stands to present day because of how it allows self correction. When the AfCFTA DSM considers *locus standi* for non-state actors, it can not be a carbon copy of other systems as this may fail to address circumstances peculiar to the African continent.

3.8 Indirect Action

This avenue of access to court is canvassed in Article 267 of the TFEU[131] where the CJEU engages in what some referred to as a dialogue between the national court and the Court of

[128] Stratieva (n 107 above)
[129] C Kombos 'The Recent Case Law on Locus Standi of Private Applicants under Art. 230 (4) EC: A Missed Opportunity or A Velvet Revolution?' (2005) *European Integration online Papers*, 9
[130] Kombos (n 117 above)
[131] The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a)the interpretation of the Treaties;
(b)the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Justice.[132] This facilitates the national courts' goal to interpret and apply European Union law and the CJEU's mission to ensure consistent application of the EU law at domestic level. Private parties have an option to pursue interim relief under Article 267 of the TFEU where they approach their local courts to challenge a measure that is imposed in kine with EU law.[133] This then means the application is not direct as the CJEU is approached via domestic courts.

In addition to promoting consistency of application of EU law the dialogue between national states and the CJEU is grounded in the principle of mutual trust between member states as contained in Article 2 of the Treaty of European Union (TEU).[134] The indirect access to the CJEU can be regarded as a way to allow access to non-state actors without addressing the steep requirements of *locus standi*. This underlying philosophy is one such that can be useful for the AfCFTA DSM, in that it avoids inconsistencies in interpretation of the same treaty. The AfCTA faces a reality where Africa has divisions of legal system where other fall the common law and others the civil. This difference may have a bearing on interpretation of the treaty and allowing for dialogue between local courts and the AfCFTA DSM avoids this loophole.

3.9 Common Proceedings before the CJEU

The CJEU hears matters where there is a request for a preliminary ruling. These rulings are handed down by domestic courts or tribunals that would be working hand in glove with the CJEU to promote uniform interpretation of the Community law. In practice how this would play out is, a court which is faced with a dispute that involves Community law may get a 'ruling reference' which then awaits the CJEU's decision and this decision becomes that of the domestic court. In the alternative the General Court pursuant to Article 256 of the TFEU may entertain matters of preliminary rulings.

[132] I Larion, 'THE MEANING OF NATIONAL COURT IN ARTICLE 267 TFEU AND THE IMPORTANCE OF THE COURT'S INDEPENDENCE'

[133] Werkmeister *et al* (n 102 above) 322.

[134] "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

The CJEU also deals with matters that involve failure to honour a Community obligation by member states.[135] More often than not the duty to initiate proceedings that deal with this type of proceeding lays with the Commission. However, other member states also enjoy the right to initiate these proceedings whereupon an investigation ensues and when fault is established, whomever is found wanting will be requested to address the fault.[136]

Annulment proceedings deal with remedying EU laws that may have some illegality. Any interested party that is, the Council, member states, the Commission or even the Parliament have locus standi to initiate these proceedings. When illegality is established, the court will have to annul it. Annulment an also be used by private party who can establish that a particular law is prejudicial to them directly as individuals. The test for 'direct and adverse' effect is then applied in the proceedings brought by private proceedings.

The fourth category of proceedings are those instituted when one fails to act. Unlike the second proceeding which involve the failure to honour an obligation failure to act is against the institutions. When the Council, Parliament and the Commission fail to make certain decisions, member states, individuals and juristic persons may lodge a complaint with the court which is then officially recorded.

After looking at what the CJEU has to offer, it is important to also look at the WTO system and what it offers. This is important as the AfCFTA which is topical in this research, is based on this model and the model is one of the two models from which African RECs copy and the AfCFTA builds.

3.10 THE WTO SYSTEM AND HOW IT WORKS

Motivated by the aim to avoid political shortcomings of the original dispute settlement mechanism under the GATT system, the WTO DSM is created the way it is.[137] The 1947 GATT

[135] https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en#:~:text=The%20Court%20of%20Justice%20of,national%20governments%20and%20EU%20institutions. (accessed 15 November 2023)

[136] https://www.europarl.europa.eu/factsheets/en/sheet/26/the-court-of-justice-of-the-european-union (accessed 15 November 2023)

[137] JA Ragosta 'Unmasking the WTO--Access to the DSB System: Can the WTO DSB Live up to the Moniker 'World Trade Court'? (2000) *L. & POL'Y International Business*

DSM required attainment of consensus to establish a Dispute Settlement Panel and for the same panel to adopt final decisions.[138] This system was advantageous only to powerful states that could influence the initiation of dispute proceedings on the grounds of consensus.[139] This reality of power politics is still at play in the WTO as evidenced by the impasse with the appointment of judges of the appeal court, that has been influenced by America. [140] Cognisant of the above the essay turns to examining how the WTO system works.

The WTO system in its current form provides for appellate review after consultations between the disputing parties. This makes consultations the first port of call for WTO disputes. The Dispute Settlement Understanding (DSU) in Article 3.7 requires members that are at loggerheads to resolve their disputes amicably and the party which has a contravened a rule to withdraw such measure in an informal/ semi formal setting. Bilateral consultations as envisioned under article 4 of the DSU allow the parties a chance to avoid litigation and resolve satisfactorily. This process is mandatory and precedes a request to the adjudication panel.

If and when consultations fail the party that seeks relief has a 60 day window in which they are permitted to lodge a request for the adjudication panel.[141]It is important to note that when this second phase is engaged parties may consent to revert back to the consultation phase of consultations.[142] This allows parties to always have to a more accessible alternative which is effective. Records show that many cases that have been before the WTO are resolved at consultation stage, and this is attributable to a satisfactory settlement or the complainant abdicated their claim.[143]

It has been previously submitted in this essay that the African states have resolved more trade disputes by using the WTO system over the CJEU system.[144] This is attributable to the litigation

[138] TA Zimmerman 'Negotiating the review of the WTO dispute settlement understanding'(2006); GT Schleyer 'Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System' (1997) *FORDHAM L. REV*
[139] Zimmerman (n 125 above)
[140] TP Stewart 'United States concerns on how and why problems have arisen, WTO Appellate Body' (2020) *Current thoughts on trade*
[141] Dispute Settlement Understanding Art. 4.5
[142] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm (accessed 02 October 2023)
[143] E H Moyer Jr & H S Shapiro 'Are WTO Dispute Settlement Proceedings Right for Your Company?'(1958) *CORP. LEGAL TIMES,*
[144] Gathii (n 22 above)

aversion nature of the state where they try to avoid adversarial litigation. Reasons to why this is are possibly a lot but some of them include, the issue of costs, the issue of time and the issue of conflict avoidance. History can vindicate the choice by the AfCFTA DSM if viewed from this vantage point. However, the limitations of this systems can never be swept under the carpet. Access to justice is not an unnecessary privilege, access to justice is a right.

African states have used the WTO dispute settlement system as a standard on which they have developed their own dispute settlement systems. Such systems are evident under the SADC, COMESA and TFTA.[145] The evidence to show that the WTO-DSM has been successful is on the surface and easy to gather, however taking the system in its entirety without change is recipe for disaster.[146] If a transplantation is to be considered, due regard has to be given to the history, politics, socio-economics and dynamisms of the African continent.

Pauwelyn noted that the "large overlap between the [original] SADC Protocol on Trade and WTO agreements" this may incubate possibilities of forum shopping because disputes that could be brought before SADC could also be brought before the WTO.[147] The same logic is true for the WTO and the AfCFTA where similarities in the founding constitution can allow a dispute to satisfy jurisdiction in different forums. Scholars like Ng'ong'ola are advocates for the WTO style because of the 'security it provides when it comes to politically unpopular decisions.'[148] An in-depth analysis will be pursued in subsequent chapters.

3.9 CONCLUSION

The AfCFTA aims to have a pan-African institution which builds on the success of African RECs. In this chapter, there has been an examination of both the CJEU and the WTO regarding access to courts for non-state actors. It is actually form these models the African RECs developed dispute settlement mechanisms and it was prudent to examine the origin of the models for a better appreciation of the African RECs and their DSMs.

[145] Akingkube (n 10 above)
[146] M. Froese 'Regional Trade Agreements and the Paradox of Dispute Settlement' (2014) *Manchester Journal International Economics* 367 (HeinOnline)
[147] J Pauwelyn 'Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions' (2004) 13 *Minn. J. Global Trade*
[148] Ng'ong'ola, "Replication of WTO Dispute Settlement processes in SADC",

Both the CJEU and the WTO have limitations that can be improved after examination of what they have to offer. The examination of the CJEU and the WTO have exposed the limitations both options offer and what to likely expect from the AfCFTA. If improvements for the AfCFTA are to borrow from the CJEU they also have to try to circumvent the limitations that defeat the purpose of allowing access to non-state actors which includes conditions attached to access.

What is consistent with both the CJEU and the WTO is the fact that both systems started as totally different bodies with different mandates and different levels of access for non-state actors. It took judicial activism to ignite the movement to relax the conditions attached to locus standi in the CJEU. It took failure to see the WTO establish itself as the body it is now and avoid past failures. The question of what it will take for the AfCFTA to realise acceptable standards of access for non-state actors is currently unknown but definitely one such variant is time. AfCFTA has to establish first what works for it and come up with a model that works.

CHAPTER 4

Locus standi of private parties with trade disputes under the AfCFTA and the RECs

4.1 Introduction

Chapter 3 above discussed how the CJEU functions with the aim to establish how its history and philosophy could be a building block for the model AfCFTA DSM which allows *locus standi.* The efforts have led to the exposing of differences in the history of the WTO based mechanism and that of the CJEU. This Chapter moves away from abstract discussions that are devoid of actual African history and considers the African RECs and their experience to derive lessons that may allow the building block as envisioned in the Preamble of the AfCFTA.[149]

Regional Economic Communities number no fewer than 8 on the continent[150], namely Arab Maghreb Union (UMA), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel–Saharan States (CEN–SAD), East African Community (EAC) Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD)2 Southern African Development Community (SADC).[151] The RECs by motif were devices that were regarded as building blocks that would eventually become the African Economic Community (AEC), which was established under the Abuja Treaty (1991).[152]

RECs have dispute settlement mechanisms which are of different characteristics with the very first being the East African Economic Cooperation (EAEC).[153] COMESA has the Court of Justice of the West African Economic and Monetary Union[154], the EAC has East African Court of Justice,[155] SADC has the Southern African Development Community Tribunal,[156] ECCAS

[149] Acknowledging the Regional Economic Communities (RECs) Free Trade Areas as building blocs.
[150] https://au.int/en/organs/recs (accessed 02 October 2023)
[151] https://au.int/en/organs/recs (accessed 02 October 2023)
[152] RF Oppong 'The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web' (2010) 18 *African J of Intl & Comparative*
[153] Treaty for East African Co-operation, Art 3(1) & 32
[154] COMESA Treaty Art 2
[155] EAC Treaty Art 23 & 27
[156] SADC Treaty Art 32

has the Justice for the Community[157] and lastly ECOWAS has the Treaty Court of Justice of the Economic Community of West African States.[158]

Guided by the leitmotif, "Access to courts for non-state actors under the AfCFTA, a right or an unnecessary privilege", this chapter will examine first how the different RECs DSMs are constituted briefly. Following from this brief introduction of their different history and how they answer the question of locus standi, the Chapter will proceed to address the options of access to courts for non-state actors. The RECs models are divided between two models, the more popular CJEU model which has arbitration style that is adversarial[159] and the less popular WTO style. Despite its lack of popularity, the WTO style has handled more trade related disputes on the continent. [160]

4.2.1 EAC COURT

The East African Community has had a history that dates back to 1917 where there was a Customs Union between Kenya and Uganda and later Tanganyika (Tanzania). [161] It was after successive treaties and even dissolution up till 1999 when the Treaty for the Establishment of the Eastern African Community (EAC Treaty) was signed.[162] The EAC under the auspices of the treaty in Article 23 as already alluded to above, established a court that would take the shape and form of the CJEU with its court of first instance and appellant court.[163] The EAC Court has ten judges in the court of first instance with a maximum of ten judges and the latter with a cap of five judges.

The court can hear matter pertaining to the interpretation and application of the EAC Treaty. This jurisdiction is extended to matters of human rights and appellant matters from domestic jurisdiction where this wider jurisdiction is futuristic as it remains an idea. The court graciously

[157] ECCAS Treaty Art 16
[158] ECOWAS Treaty Art 76
[159] JT Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free trade Agreement"(2019) *Afronomicslaw Blog*
[160] Stroll (2014)
[161] https://www.eac.int/eac-history (accessed 02 October 2023)
[162] https://www.eac.int/eac-history (accessed 02 October 2023)
[163] https://www.eacj.org/# (accessed 02 October 2023)

extends audience to non-state actors, and this is covered in Article 30(1).[164] The wording of the treaty creates an impression that access to courts under the EAC Treaty is open to not only resident countries under the EAC but also 'partners' to the EAC. Access to the court comes without a *sine qua non* to exhaust local remedies as it seems in other RECs[165] however, Article 30(2) limits the time when a party can access courts to two months after dispute arose.

4.2.2 ECOWAS COURT

Referred to as the Community Court of Justice,[166] the court was a creation of a body politic of West Africa states.[167] With the vision to development and collaboration amongst the member states to enhance the economic activities in all sectors the ECOWAS Treaty resonated closely with other RECs in Africa.[168] The first treaty was signed by a 16 member delegation in 1975 in Lagos, Nigeria and the subsequent treaty which is valid to present day in 1993.[169] With new developments and mandates for the Community a revised treaty was signed in Cotonou, Benin Republic in July, 1993 by the heads of states and government of the now 15 member states.

Subsequently, the Protocol on the Court of Justice (A/P1/7/91) was enacted in 1991 to become the judicial arm of ECOWAS and mandated with the duty to resolving the Community's Treaty disputes. [170] The 1991 Protocol was however amended by Supplementary Protocols (A.SP.1/01/05) of 2005 and (A/SP.1/06/06) of 2006. The jurisdiction of the court has evolved with the amendments to a wider jurisdiction. Originally, the court was an inter-governmental dispute settlement mechanism but has since become a community court with an expanded

[164] Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty

[165] E Ruhangisa 'Judicial Protection under the EAC Law' (2012)

[166] http://www.courtecowas.org/ (accessed 02 October 2023)

[167] ES Nwauche 'Enforcing ECOWAS Law in West African National Courts' (2011) 55 2 *Journal of African Law* 182.

[168] Nwauche (n 215 above) 182

[169] Treaty | Economic Community of West African States (ECOWAS) (accessed 02 October 2023)

[170] http://www.courtecowas.org/about-us-2/#:~:text=Subsequently%2C%20the%20Protocol%20on%20the%20Court%20of%20Justice,interpretation%20of%20the%20Community%E2%80%99s%20Treaty%2C%20Protocols%20and%20Conventions. (accessed 02 October 2023)

mandate and jurisdiction including an Advisory jurisdiction, contentious jurisdiction, and competence in matters of adjudication.[171]

Olajide Afolabi v. Federal Republic of Nigeria,[172] the court confirmed the extent of the jurisdiction under the Treaty. The ECOWAS Court does not require that applicants exhaust other alternatives before approaching thus rendering this tribunal of the broadest authority of all the human rights tribunals in the world.[173] The court is with the mandate to hold at least two mobile sessions in a year and requires member states to show the domestic courts with mandate to enforce decisions.[174] This promotes accountability on the part of the court and on the face of it is ideal.

However, there have been calls to reduce to reduce the number of employees of the court and this by extension includes the number of judges from the seven to five.[175] There have also been proposals to limit the jurisdiction of matters that can be heard before the court. Amnesty International comments that the proposal that Articles 9(4) and 10(d) of the Supplementary Protocol A/SP.1/01/05 of the CCJ, which grants direct access to the Court in cases involving violation of human rights making the rule of exhaustion of domestic remedies not applicable before the Court.[176] The Institution believes that this is going against the progress under the court as the most accessible. However, this may circumvent the problems that saw the collapse of the SADC tribunal.

The above shows the progression of locus standi before the court and it also the states attitudes towards this. The SADC tribunal as referred to above is one such tribunal that needs proper examination if the question of locus standi is to be introduced for the AfCFTA DSM.

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[171] Rethinking the Proposed Restructuring of the ECOWAS Community Court of Justice, Trust Africa. Available at: https://trustafrica.org/rethinking-the-proposed-restructuring-of-the-ecowas-community-court-of-justice-d84/ (accessed 02 October 2023)

[172] ECW/CCJ/APP/01/03

[173] Rethinking the Proposed Restructuring of the ECOWAS Community Court of Justice, Trust Africa (n 212 above)

[174] Rethinking the Proposed Restructuring of the ECOWAS Community Court of Justice, Trust Africa (n 213 above)

[175] Rethinking the Proposed Restructuring of the ECOWAS Community Court of Justice, Trust Africa (n 214 above)

[176] https://www.amnesty.org/en/documents/afr05/005/2009/en/ (accessed 02 October 2023)

4.2.3 SADC TRIBUNAL

Following from the above, when one discusses the SADC tribunal may find it necessary to go against chronology and start with the end. *Mike Campbell v Republic of Zimbabwe*, saw the eventual collapse of what was a promising tribunal, which like the ECOWAS court, granted audience to private actors for a wide range of cases. This has seen some critics side with the arguments led by Zimbabwe during the trial that the SADC tribunal should not concern itself with matters beyond trade disputes.

Originally, the Southern African Development Co-ordination Conference (SADCC) the SADC was established in 1980,[177] and in 1992, it was transformed to SADC with the mandate of 'integration of economic development'.[178] The tribunal was then established pursuant to Protocol on the Tribunal and Rules thereof 2000, which borrowed from the CJEU model and some scholars attribute this choice of model to those responsible for funding of the organization.[179] At the adoption of the model the atmosphere in the body politic was filled with euphoria that this choice would promote effective judicial oversight in the region.[180] Such euphoria was unfounded as tribunals that preceded the SADC tribunal were not exactly world class by any standard and this was to later manifest when the tribunal was faced with how to enforce its judgement.

Locus standi was granted to non-state actors but on the condition that they exhaust local remedies. Article 15(2) of the Protocol stipulates that, 'No natural or legal person shall bring an action against a State unless s/he has exhausted all available remedies…'[181] The Protocol was signed in 2000 and only came into force in 2001[182] and like other regional bodies it listed the extent of its jurisdiction in its founding treaty. Interpretation of the founding treaty, and any agreements concluded amongst member state and or any other agreement that subjected itself

[177] SADC 'History and Treaty' https://www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 02 October 2023).
[178] SADC 'History and Treaty' (n 218 above)
[179] KJ Alter, JT Gathii and LR Helfer 'Backlash against international Courts in West, East and Southern Africa: Causes and Consequences' 2016 27 2 *European Journal of International Law* 307; Obonje (n 31 above) 296
[180] Alter *et al* (n 211 above) 307.
[181] Protocol on Tribunal in the SADC (SADC Protocol), 2000
[182] https://www.sadc.int/services-and-centres/sadc-administrative-tribunal-sadcat (accessed 02 October 2023)

to the treaty rules.[183] It was however Article 18 of the SADC Protocol that was to be the cause of its demise after it was given a 'wide interpretation' by the tribunal.

Article 18 of the Protocol gave the tribunal what it referred to as exclusive jurisdiction, which allowed it to hear **all disputes** [my emphasis] between natural or legal persons and the Community. This was subservient to Article 15(2) which required the applicant to exhaust local remedies first or only approach the tribunal when the local remedies were inaccessible.[184] This was put to test in the *Mike Campbell v Republic of Zimbabwe* case,[185] Zimbabwe was found to have transgressed Article 6(2) of the SADC Treaty and this was the beginning of the end for the tribunal.

The question of enforcement exposed the tribunal's weakness as it relied on the state (Zimbabwe) to enforce a decision against it. The high court of Zimbabwe however found that the tribunal held against the constitution of Zimbabwe and such a decision could not be enforced by a court in Zimbabwe.[186] It is trite to note that there was a Constitutional amendment that foiled the tribunal's effort after the ruling was handed down already, and in furtherance of nailing the tribunal, Zimbabwe led an expedition that saw the collapse of the tribunal.[187] To this date the tribunal has become a white elephant as it exists in Protocols and has since ceased to hear all matters.

4.2.4 COMESA COURT

This court like other courts in the region saw progression from one treaty to another as their founding constitution. The current foundation was concluded in December 1994 after the Preferential Trade Area (PTA) of 1981. The Court was an appendage to a larger organisation,[188] and it opened its doors in 1998 under the Agreement Establishing a Common Market for Eastern and Southern Africa (COMESA Treaty).[189] The CCJ is a regional trade court,[190] which

[183] Article 14 SADC Protocol, 2000
[184] Article 15(2) SADC Protocol
[185] Afadameh-Adeyemi and Kalula (n 217 above) 15
[186] http://www.swradioafrica.com/pages/sadctribunal250110.htm#summary (accessed 02 October 2023)
[187] Hager S 'SADC Tribunal Struggles for Legitimacy' (2009) *Amnesty International*
[188] COMESA 'COMESA in brief ' (September 2018) https://www.comesa.int/what-is-comesa/
[189] TREATY ESTABLISHING THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA Available at: https://www.comesa.int/wp-content/uploads/2019/02/comesa-treaty-revised-20092012_with-zaire_final.pdf
[190] JT Gathii 'The COMESA Court of Justice' in R Howse, H Ruiz-Fabri, G Ulfstein and MQ Zang (eds) (2018) *The Legitimacy of International Trade Courts and Tribunals* 314

is established as of Article 19 of the COMESA Treaty.[191] In its form the court also has the 'First Instance Division and an Appellate Division'[192]and the courts consist of 'seven judges for the court of first instance whereas the Appellant court has five'.[193]

The CCJ like all other regional courts referred to above is empowered to hear matter that involve the interpretation of the founding treaty and in addition unfair trade practices. [194]. The court can hear matters where contracts subject themselves to the courts jurisdiction and matters that involve employees from the COMESA region.[195] Like the SADC tribunal discussed above the COMESA court affords audience to non-state actors on the condition that the exhaust all domestic remedies. [196] The case of *Polytol Paints & Adhesives Manufacturers Co. Ltd (*Applicant*) versus The Republic of Mauritius (*Respondent*)[197]* was tasked to address the Article 46 provision on locus standi.

In this matter the Applicants based their arguments on Article 46 of the COMESA Treaty,[198] where Mauritius initially complied with this obligation but in 2001 re-introduced a 40% customs duty on specific products imported from Egypt (another COMESA member).[199] To confirm *locus standi* the CCJ had to consider whether there was indeed a breach of the COMESA treaty and this was answered in the affirmative.[200] The Court also considered whether or not COMESA member states had enforceable rights under the treaty which was also answered in the affirmative. The Court held that to satisfy this requirement, states only had to prove prejudice from an act or omission by a fellow member state. [201] It is also trite to note that the Applicant had failed to please the court in Mauritian domestic courts and then approached the CCJ.[202]

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[191] COMESA Treaty (n 230 above)
[192] COMESA Treaty Art 19(2)
[193] COMESA Treaty. Art 20(1)
[194] https://www.comesa.int/wp-content/uploads/2020/05/COMESA-in-brief-FINAL-_web.pdf (accessed 02 October 2023)11.
[195] Gathii (n 175 above) 319.
[196] COMESA Treaty Art 26
[197] *Polytol Paints & Adhesives Manufacturers Co. Ltd versus The Republic of Mauritius* (2013)
[198] The Member States shall reduce and ultimately eliminate by the year 2000, in accordance with the programme adopted by the PTA Authority, customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods which are eligible for Common Market tariff treatment.

[199] G Erasmus, '*The Polytol judgment of the COMESA Court of Justice: Implications for rules-based regional integration'* Tralac
[200] Polytol Paints v the Republic of Mauritius paras 13 & 14.
[201] Polytol Paints v the Republic of Mauritius para 19.
[202] Polytol Paints v the Republic of Mauritius para 4.

The CCJ ruled in favour of *Polytol* (Applicants) and created judicial precedence of how private parties can access courts and they awarded relief that required repayment of part of duty paid. This matter is a *locus classicus*[203] and a book from whence the AfCFTA DSM can borrow philosophy from.

Although many RECs have the European styled adversarial European Union courts, most of the disputes adjudicated before the regional courts have been non-trade[204]. The WTO dispute settlement mechanism has evidently proven more common for trade relations between African States.[205] It has already been referred to above that the AfCFTA dispute settlement mechanism is a carbon copy of the WTO DSM. This is also true for the Tripartite Free Trade Area ('TFTA'), a free trade area between three RECs: COMESA, SADC, and the EAC. [206] An examination of this DSM will now follow.

4.2.5 TRIPARTITE FREE TRADE AREA DSM

The agreement is one constituted by three RECs: COMESA, the EAC and SADC which agreed in October 2008 to negotiate a Tripartite Free Trade Area (TFTA).[207] The TFTA Memorandum of Understanding underpins the legal and institutional framework. Like the RECs discussed above the TFTA also developed with times and this saw the introduction of a revised Draft Agreement and Annexes that was completed 2010. Article 30 of the TFTA establishes the DSM which is the closest to what the AfCFTA is going to be.

It is important to note that 13 years after the first revised Draft, the AfCFTA is yet to be operational. This refers to it of no use for this research besides the fact that it has actually dragged this long. This DSM like all the others discussed above will then be considered below to address the question of *locus standi*. It has been established that there are varying extent regarding access to courts in the RECs. To address the research topic, 'Access to courts under

[203] most authoritative on a particular subject
[204] Gathii JT 'The Performance of African's International Courts: Using Litigation for Political, Legal, and Social Change' (2020) *OUP Oxford*
[205] Stoll P 'World Trade Organization (WTO)' in R Wolfrum (ed) (2014)*The Max Planck Encylopedia of Public International Law*
[206] Parshotam A 'Can the African Continental Free Trade Area Offer A New Beginning for Trade in Africa' (2019) *SAIIA Occasional Paper No. 280*
[207] SADC-EAC-COMESA Tripartite Free Trade Area Legal Texts and Policy Documents, TRALAC

the AfCFTA: a right or an unnecessary privilege?' the chapter now examines which extent of access should be extended to non-state actors.

4.3 LESSONS FOR THE AFCFTA DSM

4.3.1 EXHAUST DOMESTIC REMEDIES AS A SINE QUA NON TO ACCESS COURTS.

From the above investigation it has been established that locus standi comes with different conditions that need to be satisfied before access is granted. Such conditional access has been evidenced under the COMESA and the SADC tribunals as it existed before the *Campbell* case. Making exhaustion of local remedies a *sine qua non* is not peculiar to African RECs only as it can be found under the principles of international law. [208] This requirement can be traced back to the principle of state sovereignty where states are to be allowed to self-determine as was envisaged under the Treaty of Westphalia, 1648.[209] This courtesy allows states to decide on a matter before external bodies intervene to assist. Tribunals thus act to provide checks and balances on a grander stage and limit state sovereignty in matters that are common within a region.

It follows from earlier submissions that this requirement although noble and in line with International Law practice it may be abused to frustrate applicants and cause litigation fatigue. This may then dissuade parties who may believe that domestic courts are likely going to decide in favour of their state over the interest of private individual. The case to draw an example from would be the already discussed Harare (Zimbabwe) courts and how they decided after the *Campbell* case. From a legal point of view, regardless of the impression that was created by the Harare courts, the judgement was legally correct. This was so according to the laws of the country that existed then, and the courts being limited by statute could not decide any differently. Although the domestic courts are enforcement mechanisms that work together with the tribunal, the reality is domestic courts are what empower them, and they cannot act beyond the bestowed upon them.

[208] Onaria (n 31 above) 153.
[209] https://www.oxfordbibliographies.com/display/document/obo-9780199743292/obo-9780199743292-0073.xml (accessed 02 October 2023)

This exposes the second limitation of conditional access: state manipulation/interference. The state through its legislature empowers and disempower courts by drafting legislation that governs courts. If a government seeks to evade international accountability it can simply limit the power bestowed upon its own judiciary both as a court of first instance and as an enforcement body. Chinamasa, the Minister of Justice at the time of the *Campbell* case worked in cohorts with the then government of Zimbabwe to work against the SADC tribunal.

On the other hand, the SADC Tribunal introduced an interesting facet that indirectly waived the exhaustion of local remedies requirement in the *Mike Campbell v Republic of Zimbabwe* case.[210] The Zimbabwean government with the sole purpose to foil the SADC tribunal efforts amended the Zimbabwean Constitution in 2005 where it made land expropriation without compensation constitutional.[211] This then meant that applications for relief under Zimbabwe courts could not satisfy the first question that would have the court grant you audience, which is: what prejudice have you suffered? The amendment had made loss of land not prejudicial to anyone if it was carried out by the state in line with the government's land reform program. It was based on this amendment that the SADC Tribunal introduced a waiver where if applicants had no local remedy, they could apply directly to the tribunal for relief domestically.[212]

In addition to the limitation of conditional access is the failure to consistently interpret the condition by the same court. The reason why COMESA is fraught with such inconsistencies is because it does not follow the doctrine of stare decis and this was evident the case of the *Republic of Kenya v Coastal Aquaculture Limited*. In this case the court held that the court could only allow non-state actors access after they had shown that they had exhausted all domestic remedies that were available to them.[213] The applicants who were non-state actors and a juristic person faced land expropriation at the hands of the government and considered first domestic courts but abdicated this pursuit before a judgement was handed down.[214] This according to the court then made the court decide that Article 26 of the COMESA was not satisfied and this meant the court did not have jurisdiction to hear the matter and dismiss the case.[215] If sentience towards the frustration caused by Article 26 is worth noting, the court can

[210] Case No 124/06 Judgement 28 November 2008.
[211] Onaria (n 31 above) 155.
[212] Onaria (n 31 above) 155-156.
[213] COMESA Court Ref No 3 of 2001, Judgement.
[214] *Republic of Kenya v Costal Aquaculture Limited* para 18.
[215] *Republic of Kenya v Costal Aquaculture Limited* paras 16,17 &20.

be applauded for conceding that the delay was indeed lengthy regarding allowing relief for the disgruntled party.

Conditional access may be necessary to avoid flooding the courts with multiple cases and clog the roll to an extent that justice is eventually delayed. Conditions also assist in guiding the courts in a particular direction when it comes to what cases it can hear and promotes certainty for both states and non-states alike as to where relief can be sought. However, conditions can create barriers that cannot be overcome and *de facto* result in denial of access for non-state actors. Unsurmountable conditions inadvertently also result in multiple interpretations that are inconsistent, lengthy and costly litigations and litigation fatigue that all act against the goal of the AfCFTA which is to promote trade. In the absence of predictability of safety nets for traders, non-state actors assume unmitigated risk which dissuades trade. Allowing access to courts without condition that will now be explored in the subsequent paragraphs.

4.3.2 UNMITIGATED ACCESS

Unmitigated access allows any party access to courts if they manage to please the court that they have been prejudiced by in/action that falls under the auspices of the founding treaty. As has been established above, the EAC and ECOWAS tribunals entertains matters that prove that an application before it satisfies the requirements of jurisdiction without showing that they first approached another tribunal. Judicial precedent has been consistent with this unmitigated access for non-state actors and inference has suggested it is correct to conclude that no other requirements are necessary to be allowed audience by the court.

In the case of *Ekundayo Idris v. the Federal Republic of Nigeria* the court was satisfied that it had jurisdiction over the matter under Article 10(d) of the Supplementary Protocol on the Court.[216] Although access came with no pre-conditions it did have a caveat to it that required that the case ought to only be before one court and none other once it is lodges.[217] This requirement is not one that is restricted to prior making the application but also during and after application to the court. The mischief this condition addresses is one of forum shopping. Forum

[216] Access to the court is open to individuals on application for relief for violation of their human rights, the submission of application for which shall; i) Not be anonymous; nor ii) Be made whilst the same matter has been instituted before another international court for adjudication

[217] Sang (n 24 above) 366.

shopping involves a practice where an applicant seeking relief subject to concurrent jurisdiction opts for a court they presume will most likely decide favourable to their cause.[218]

Forum shopping may also be motivated by the extent of relief one may get after successfully defending their claim. The question of compensation is one that also comes with conditions to be satisfied before tribunals with unmitigated access. In the case *Sunday Charles Ugwuaba v State of Senegal* the court did not grant compensation to an applicant who had successfully established locus standi. This was because according to the court, the applicant failed to establish a causal nexus between the loss and the action of the state. This goes to show how regardless of access to the court, it remains important for non-state actors to prove the link between the action of the transgressor and the harm\loss incurred. In the absence of same the court will grant locus standi but only hand an academic judgement that punishes or compensates anyone,

The EAC like the ECOWAS court extends the right to access to courts to private actors. In *Prof Peter Anyang' Nyong'o v AG of the Republic of Kenya*, the EAC held that non-state actors also have an unmitigated access to lodge a complaint against a member state or organs of the EAC community. It further held explicitly that there was no need to exhaust local remedies before approaching the court.[219] The court held that under Article 30, of the Treaty, "the Court is empowered to exercise that jurisdiction by determining the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community referred to it."[220] In this judgement the court allowed for an interim injunction and differentiated between the law of tort and an Article 30 application.

The ongoing discussion has shown that the choice between conditional and non-conditional access both have their pros and cons. The consideration for the AfCFTA DSM will have to bear in mind either side of the coin after proper investigation. However, the default position of the AfCFTA is also an option worth discussion. The default position is one of no access, and this may be motivated by the fact that the drafters of the AfCFTA saw access to courts for non-state actors as an unnecessary privilege. This third option is now address in turn.

[218] https://www.law.cornell.edu/wex/forum_shopping (accessed 03 October 2023)
[219] *Prof Peter Anyang' Nyong'o v AG of the Republic of Kenya* 21; Onaria (n 31 above) 156.
[220] *Prof Peter Anyang* (n 210 above)

4.3.3 "…Unnecessary privilege?"

Reflection to the research topic will firstly be reemphasized before engaging this option, 'Access to courts for non-state actors under the AfCFTA: a right or unnecessary privilege?' The SADC tribunal was rendered defunct by the *Campbell* case, some scholars are of the view that by establishing jurisdiction over the case the tribunal was the author of its own misery.[221] The most common argument against the SADC tribunal was that it was a proxy used by colonial powers to push regime change in their former colonies.[222] This comes from the idea that since the European Union funds its replicas, it also has considerable say in the running of the institutions.[223] The question of whether the speculation was founded or not is immaterial because it is the consequence of such speculation that informs one of the attitude of African states. For the avoidance of such repetition, maybe the drafters of the AfCFTA saw it necessary to completely shut the door for non-state actors.

The response to the threat of the SADC tribunal reality is one that cannot be overlooked but throwing the bath water together with the baby seems too harsh a response to the risk. It has already been discussed above that the AfCFTA DSM when considering extending locus standi, it may consider introducing conditions like other regional tribunals in Africa have. Such conditions should be sensitive to the realities in Africa. In particular if the concern hovers around the cases that may be heard by the AfCFTA DSM, limits may include those that promote commerce under the AfCFTA and nothing else. In the case where there is an intersection between commerce and another discipline like Human Rights, courts may consider limiting themselves to the commercial aspect of a dispute.

4.4 INSTITUTIONS TO SUPPORT THE AFCFTA DSM

It is better to have good implementation of bad law than having good law and poor implementation. The law as it exists in black and white on the paper may be good but if those in charge of enforcing it lack political will and are corrupt the law is as good as non-existent. For the AfCFTA DSM to work efficiently it would require supporting mechanisms like

[221] J Maromo 'Zuma's role in dismantling SADC Tribunal slammed by court' (2018) *Independent Online*. 4
[222] O Ruppel & F Bangamwabo 'The SADC Tribunal: A legal analysis of its mandate and role in regional integration' (2008) *Monitoring Regional Integration in Southern Africa Yearbook 2008*
[223] L Nathan 'Solidarity Triumphs over Democracy: The Dissolution of the SADC Tribunal' (2011) *University of Pretoria Repository*

domestic courts, not only as enforcement mechanisms for the AfCFTA DSM but also to mitigate corruption that may see governments evade international obligations through domesic legislation.

Institutions worth emulation are the judicial branch of the South African government, the courts. After South Africa through the then President, Jacob Zuma signed the death note to the SADC tribunal, the courts challenged his executive power. In the case of *Law Society of South Africa*[224]the court was of the view that the SADC Treaty created an obligation on the state to enhance access to justice and the support for the disbanding of the SADC tribunal achieved the opposite of that.[225] According to the Constitution of South Africa itself there exists a mandate that requires that the President and everyone in South Africa respect International Law and such law being the SADC treaty in this instance.[226] The court held that the executive decision made to support the denying of locus standi of private parties was unconstitutional and requested the president withdraw his signature.[227] Whether this was followed or not is not subject to inquiry for the purpose of the point sought to be made.

Tanzania like South Africa also heard a similar case before its High Court in *Tanganyika Law Society v Ministry of Foreign Affairs*. Unlike the South Africa however the reasoning of the court was that the decision to support the continuation of the SADC tribunal was a threat to the Rule of Law.[228] The court went further to suggest that for any SADC Treaty related dispute private actors may use their courts to sought relief.[229] Whether this courtesy cures the limitations of the SADC tribunal after *Campbell* is again irrelevant for the present investigation. However, this is important to show political will to see regional treaties achieve their intended goals.

[224] *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) (11 December 2018)
[225] *Law Society of South Africa v President of the Republic of South Africa* para 67.
[226] *Law Society of South Africa v President of the Republic of South Africa* paras 75, 77, 80 & 85.
[227] *Law Society of South Africa v President of the Republic of South Africa* para 94; TRALAC 'South Africa withdraws its signature from the decision to abolish the SADC Tribunal' (13 September 2019) *TRALAC*.
[228] MS Phooko and M Nyathi 'The revival of the SADC Tribunal by South African courts: A contextual analysis of the decision of the Constitutional Court of South Africa' (2019) 52 1 *De Jure Law journal* 429; G Erasmus 'Another Ruling against the dismantling of the SADC Tribunal' (11 July 2019) tralac.
[229] Phooko and Nyathi (n 257 above) 429.

Civil Society Organizations (CSO) may also assist with lobbying that promotes checks and balances and encourage respect for international obligations.[230] CSO may educate, empower and equip the citizenry with knowledge that can be used to challenge executive power that aims at avoiding accountability. This however may face stiff resistance in countries that may simply out legislate the CSOs themselves for interfering in politics. This is a fair criticism as CSOs cannot be exonerated from possibly acting in the best interests of its funders and founders. The limitations are accepted but the suggestion in principle allows for institutional support to the effect of protecting access to justice for non-state actors.

Institutional support would also include funding that would allow broader access to courts for all potential traders who may benefit from the AfCFTA.[231] It has been established above that the African continent is predominantly constituted by informal traders and such traders are limited to the metropolis and its peripheries. This means that for a functional institution of the AfCFTA DSM there is going to be a need for financial commitments that allow access to courts for the broader beneficiaries of the *locus standi.* Funding will also allow training of court officials in domestic courts that may act as enforcement courts or courts of first instance.

4.5 CONCLUSION

The African disputes settlement bodies provided for under regional agreements either provide direct access like the EAC and ECOWAS or provide conditional access like COMESA or no access at all like the SADC tribunal and the AfCFTA DSM. The varying degrees of access have been shown to be motivated by various reasons. The reasons show that Africa has a panoply of realities and preferences when it comes to the issue of access to courts. Such diversity is one that might have motivated the drafters of the AfCFTA Protocol to exclude access to courts for non-state actors.

Indeed, such concerns are founded as the courts still allow for access to courts for non-state actors using states as vehicles in the claims at the court. This is without doubt fraught with its difficulties and some of them have been discussed at length herein and some not. The evidence

[230] P Fabricius 'Will South Africa fight for the SADC Tribunal's revival?' (2019) *Institute for Security Studies*
[231] R Bowd 'Access to justice in Africa: Comparisons between Sierra Leone, Tanzania and Zambia' (2009) *Institute for Security Studies Policy Brief*

gathered has shown that RECs DSMs that opted for the CJEU model end up dealing with Human Rights matters mostly. This is whilst the WTO model has provided the choice for trade related disputes on the continent. This can be used to show that the choice of model is not mala fide but cognizant of the goals of the AfCFTA which is to boost trade.

The possible consequence of awarding access whether it is conditional or unconditional, is positive in that private parties are at least afforded an opportunity to acquire justice for a breach of the treaty law. The possible consequence of not awarding access also have the positive to avoid swamping the courts with cases and eventually delaying justice which has been likened to its denial in other circles. On the inverse, conditional access raises a plethora of questions that include but not limited to: what conditions? Unconditional access on the other makes the AfCFTA DSM the supreme court of all appeals and threatens the existence of the mechanism in total. No access shuts the door to access to justice but it leaves the window open.

Access to courts may have been limited through the most direct way but the option to use states at this point of the AfCFTA also avoids overwhelming a project in its infancy. The burden to unite the entire continent of the largest land mass, of a very dynamic and youthful population and of a heterogeneous society is grandiose it can only be consummated in phases. The AfCFTA itself has arranged for staggered implementation of protocols, alive to the fact that a wholesome adoption can threaten the entire project. If this is true for the other protocols it should be true of all other improvements that require a lot of considerations.

The question, “Access to courts for non-state actors under the AfCFTA: A right or unnecessary privilege?” can now be addressed. Access to courts under the AfCFTA is indeed a right without dispute, but given the stage at which the AfCFTA is it may seem an unnecessary privilege. This project has gone through numerous ways locus standi can be extended to non-state actors and it has been established that numerous considerations are necessary if the project is to benefit the AfCFTA DSM. It is a question of when such a project should be considered, the answer is not definitive according to the author but not now.

CHAPTER 5

ACCESS TO COURTS FOR NON-STATE ACTORS UNDER THE AFCFTA; A RIGHT OR AN UNNECESSARY PRIVILEGE?

5.1 Conclusion

'Not now' Chapter 4 has concluded in response to the question of when to allow access to courts for non-state actors. The topical question has recurred from the very first Chapter through to the fourth Chapter that immediately preceded this one. Privilege, "an advantage that only one person or group of people has."[232] From the definition of privilege it can be established that the research has not shown any argument to show that access to court is an unnecessary advantage save to say that given the circumstance such advantage cannot be satisfied. The reasoning that led to this conclusion is because the AfCFTA is a project in its infancy and considering improvement to it may collapse it and this will be disadvantageous to the same grouping that may benefit from its success.

The research has considered first how *locus standi* could be established by looking at the theoretical framework of law itself and shown how much of thought and legal manoeuvring is required to successfully allow access for non-state actors. This showed that the effort requires political will and resources to succeed but that political will and resources are still very important in other respects of the AfCFTA like establishing the full functioning of the project in itself.

In the third chapter there was an examination of the functionality of the CJEU, a model that has many replicas on the African continent. This study showed that the CJEU may have a common model but this is not entirely motivated by the competency of the model itself as it still has very limiting conditions for access to courts. This has managed to show that even the

[232] Cambridge dictionary (note 103 above)

most popular model is still developing many decades after it came into existence, and given the infancy of the AfCFTA project the project should first run for some time to discover what works and what doesn't, instead of a copy and paste project.
The fourth topic then looked at the Regional tribunals in Africa which the AfCFTA seeks to build from. This managed to expose the varying degrees of access allowed in different regions by these tribunals. In this Chapter, there might have been a tribunal that was singled out as one worth emulation with little amendments. Although this was established in this chapter, the financial limitation, lack of political will and the infancy of the AfCFTA project weigh down on considering building from that project.

Any further examination of the importance of private parties in international may result in analysis paralysis. For the sake of brevity access to courts is indeed a right, allowing such access to 55 states is commendable but extending this to a billion others more so. If Jeremy Bentham's philosophy of Utilitarianism is anything to go by, the balance tips overwhelming in favour of allowing access to non-state actors. At what cost? The likely collapse of the AfCFTA in its entirety if prematurely considered.

International Law has since moved away from the archaic standpoint that postulated that only states enjoy legal standing in international arena. The standpoint has since lost its shine and shield and it would be prudent for the AfCFTA to accustom itself with current trends and/or create progressive trends itself. The research has touched base on several arguments of the benefits of allowing access to private parties. The research then leaves an open-ended question of when such development is necessary.

The WTO DSB on which the AfCFTA DSM seeks inspiration is adamant and arrogant in its refusal to grant private parties with standing. This despite its limitations has actually served the African continent better when it comes to trade disputes. Although the WTO has since explored accommodating private parties through the establishment of the World Trade Forum and allowing public participation in trade policy debates, this has left the pertinent issue of providing *locus standi* to private parties unresolved. There is still a lot more that needs to be done internationally in terms of assisting private parties to acquire justice in their trade disputes, to strengthen trade and accountability on the part of states, and to enhance cooperation between the WTO as an organization with private parties.

5.2 RECOMMENDATIONS

It follows from the above findings that it would only be prudent to accept that allowing access to non-state actors is necessary, but this should be preceded by other developments under the AfCFTA that cements it in the grassroots of the continent.

When such a time comes and trade under the AfCFTA is realized, and gains traction only then can the AfCFTA consider the pilot phase of the upgraded AfCFTA DSM. Just like trade under the AfCFTA has been adopted through the pilot phase of the Guided Trade Initiative, so can the modified DSM be slowly adopted. The pilot can make use of the COMESA court and substitute the COMESA treaty or add to it the AfCFTA as founding treaty save for the Article that denies access to non-state actors. After a pilot period maybe of 5 years, countries can submit applications to fall under the jurisdiction of the court.

Allowing access should not be without conditions though, such a condition can be, exhaustion of local remedies. Local remedies should not be the existent courts but special courts that are dedicated to trade disputes and at as part of the AfCFTA DSM system but within a specific jurisdiction of a member state.

The second condition will address the concern of a possibility of flooded court rolls if non-state actors are allowed access. To address this concern, there should strict rules put in place that limit the access to court for non-state actors. However, this should not be as strict as has been seen for the CJEU above where access to courts then becomes near impossible, but just strict enough to keep frivolous applications away from the courts.

The third condition which is common in any court is to establish that there has been contravention of the founding treaty (AfCFTA). The goal of this is to ensure that the court does not deal with matters beyond the confines of the treaty. This may be beneficial in avoiding the SADC curse where countries feel their sovereignty is undermined by a court that is adjudicating politically sensitive matters.

Furthermore, the said contravention should be shown to have caused harm to the applicant. The definition of harm may be expanded from the following, a) economic loss, b) enjoyment of a

right that flows from the AfCFTA, c) inconvenience to trade. These conditions already exists in the CJEU model and may be expanded to suit the sensitivities of the society at the time.

Alternative dispute resolution mechanism should also be available as those that exists under the COMESA to suit the litigation averse nature of Africa. It should be possible to resolve dispute between parties with the AfCFTA at arm's length. This should be a mechanism that makes use of technology like emails, Skype, Teams and even WhatsApp platforms for swift and inexpensive conflict resolution. Recommendations from the DSM should also be as informal as possible to allow laymen and SMEs and informal traders to be accommodated too. This option should however count as first that is without prejudice and discussions under this forum can not be used against the other party when later parties consider litigation. This would allow parties to consider negotiations with the aim to resolve disputes without fear of having the resolutions used against them later as admissions of wrongdoing.

Equally important is the enforcement of the remedial action by the AfCFTA DSM. One way to encourage compliance is to have a schedule of offences and a table of possible sanctions that follow from such violations. This allows parties to predetermine their fate when violation is confirmed and does away with the possible actual or perceived biases that may have states defy orders. The sanctions should also be more rehabilitative than they are punitive, to allow transgressors a chance to learn from their own mistakes and allow them life after punishment.

Sanctions although defined, they also be applied sui generis and consider the ability of party to satisfy the demands of remedial action. Punishments should try to avoid sanctions that go against the efforts of the AfCFTA and threaten trade.

Although excommunication from the benefits that flow from the AfCFTA should still be considered as the maximum sanction. The sanction should be structured in such a way that its effect does not affect those that may be innocent. Targeted sanctions will help keep the spirit of the AfCFTA alive to all those that are compliant and punishment limited to transgressors alone. All these sanctions are just limited to this paper in the absence of political will and this can not be an obligation that is imposed from the treaty itself but hoped for by the author.

Access to courts for non-state actors is indeed a right but is currently an unnecessary privilege until a time when the AfCFTA gains traction on the continent

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